APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DECIDED SEPTEMBER 24, 2008

In the
United States Court of Appeals
For the Seventh Circuit

No. 07-1326

BRYAN ANDREWS and SUSAN ANDREWS,

Plaintiffs-Appellees,

v.

CHEVY CHASE BANK,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 05 C 454—**Lynn Adelman**, *Judge.*

ARGUED SEPTEMBER 26, 2007 —
DECIDED SEPTEMBER 24, 2008

Before MANION, EVANS, and SYKES, *Circuit Judges.*

SYKES, *Circuit Judge*. In this interlocutory appeal, we are called on to answer one question: May a class action be certified for claims seeking the remedy of rescission under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1635? The only two federal appellate courts to have addressed this question have answered "no," *see McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418 (1st Cir. 2007); *James v. Home Constr. Co. of Mobile, Inc.*, 621 F.2d 727 (5th Cir. 1980), and we agree. TILA's statutory-damages remedy, § 1640(a)(2), specifically references class actions (by providing a damages cap), but TILA's rescission remedy, § 1635, omits any reference to class actions. This omission, and the fundamental incompatibility between the statutory-rescission remedy set forth in § 1635 and the class form of action, persuade us as a matter of law that TILA rescission class actions may not be maintained.

I. Background

In June 2004 plaintiffs Susan and Bryan Andrews obtained a loan from defendant Chevy Chase Bank, F.S.B., a federally chartered bank, to refinance their home in Cedarburg, Wisconsin. Bryan Andrews runs his own home-remodeling business, and the Andrews are experienced mortgagors, having previously taken out many original and refinancing mortgage loans for various residential and investment properties. This time, they opted for a unique type of loan product offered by Chevy Chase that allowed them to vary their payment, depending on their monthly cash flow.

Appendix A

This "cashflow payment option," as Chevy Chase called it, was more flexible than a traditional fixed- or adjustable-rate mortgage because it allowed the debtor to choose between multiple payment options. It was also more complex, with a potential trap for the unwary. The debtor could pay a monthly minimum payment at a low interest rate for an initial term; under this option, while the interest rate would adjust monthly, the minimum payments would remain fixed at the low rate until the initial term expired or the outstanding balance exceeded 110 percent of the original loan (through "negative amortization"), whichever event occurred first. The debtor could also decide to make payments larger than the minimum monthly payment, pay interest only based on the fully indexed rate, pay an amount sufficient to amortize the loan over 15 years, or pay an amount sufficient to amortize the loan over 30 years.

Chevy Chase provided preliminary disclosures about the loan and, at closing, an adjustable-rate note, a truth-in-lending disclosure statement ("TILDS"), and an adjustable-rate rider. When the Andrews obtained the loan, they thought that the monthly payment *and* the interest rate were fixed for the initial term of five years and became variable thereafter. They were correct about the minimum monthly payment but not about the interest rate. The loan's discounted (or "teaser") interest rate of 1.95 percent applied only to the first monthly payment. After that, the interest rate adjusted every month, even though the minimum

monthly payment remained fixed according to the initial rate. So as the interest rate climbed, an ever-increasing portion of the minimum monthly payment of $701.21 was required to cover the interest. Soon, the minimum monthly payment itself became insufficient to cover the accrued interest, and the "negative amortization" feature (adding the unpaid interest to the principal) kicked in.

In April 2005 the Andrews filed this purported class-action lawsuit against Chevy Chase claiming violations of TILA and seeking statutory damages under § 1640(a)(2), rescission under § 1635, and attorneys' fees under § 1640(a)(3).[1] The complaint alleged that certain of Chevy Chase's disclosures were misleading or unclear, particularly as to whether the initial interest rate was fixed and whether the payment periods were properly stated. More specifically, they alleged that Chevy Chase's payment schedule was not sufficiently detailed because it listed only the first and last payment dates; they also claimed that a computer-generated stamp on the top of one of Chevy Chase's disclosure forms made the disclosures misleading. This stamp, they asserted—which referred to the note as a "WS Cashflow 5-Year Fixed Note Interest Rate: 1.950%"—could be understood to identify the note as a fixed-rate note.

The district court granted summary judgment for the Andrews, authorizing rescission and

[1] The Andrews did not seek actual damages under § 1640(a)(1).

awarding attorneys' fees, though it denied their claim for statutory damages because Chevy Chase's TILA violations were not those enumerated in § 1640(a), for which statutory damages are available. *See Andrews v. Chevy Chase Bank, FSB*, 240 F.R.D. 612 (E.D. Wis. 2007). In the same order, the district court granted the Andrews' motion for class certification under Rule 23(b)(2) of the *Federal Rules of Civil Procedure*, declaring that all class members would have the right to rescind their mortgages. The certified class includes anyone who obtained an adjustable-rate mortgage from Chevy Chase on a primary residence between April 20, 2004, and January 16, 2007, and who received a TILDS from Chevy Chase containing any of the language the court had found deficient under TILA.

In its decision on class certification, the district court relied heavily on the Massachusetts district court decision in *McKenna*. *McKenna v. First Horizon Home Loan Corp.*, 429 F. Supp. 2d 291, 296 (D. Mass. 2006). But that decision was reversed by the Court of Appeals for the First Circuit less than two weeks after the court granted class certification. *McKenna*, 475 F.3d at 420. After we granted Chevy Chase's petition for leave to appeal pursuant to Rule 23(f), the district court agreed to stay its proceedings. The court then issued a memorandum explaining why its class-certification order should stand, despite the reversal of the district court's decision in *McKenna*. *Andrews v. Chevy Chase Bank, FSB*, 474 F. Supp. 2d 1006 (E.D. Wis. 2007). Also, recognizing that it had failed to consider TILA

provisions that prohibit certain debtors from rescinding, *see* § 1635(e), the court stated that it would likely narrow the definition of the class, if its class-certification decision survived the appeal.

II. Discussion

We generally review a grant of class certification for an abuse of discretion, but "purely legal" determinations made in support of that decision are reviewed de novo. *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 340 (7th Cir. 1997). Whether TILA allows claims for rescission to be maintained in a class-action format is an issue of first impression in our circuit, but the First and Fifth Circuits, in addition to California's court of appeals, have held as a matter of law that rescission class actions are unavailable under TILA. *See McKenna*, 475 F.3d at 427; *James*, 621 F.2d at 731; *see also LaLiberte v. Pac. Mercantile Bank*, 53 Cal. Rptr. 3d 745 (Cal. Ct. App. 2007), *cert. denied*, 128 S. Ct. 393 (2007).

TILA was designed "to assure a meaningful disclosure of credit terms" to the consumer. § 1601(a). Creditors who violate the disclosure requirements may be ordered to pay actual damages or statutory damages, depending upon the nature of the violation. *See* § 1640(a)(1) & (a)(2). In certain loan transactions, TILA also provides debtors with a right of rescission—a process in which the creditor terminates its security interest and returns any payments made by the debtor in exchange for the

debtor's return of all funds or property received from the creditor (usually, the loan proceeds). *See* § 1635. Debtors may rescind under TILA by midnight of the third business day after the transaction for any reason whatsoever. *See* § 1635(a). The three-day postclosing "cooling off" period is extended if the creditor does not deliver the required notice of the right to rescind and all material disclosures; in that instance, the right to rescind continues until the creditor provides the required notice and disclosures, or up to three years after consummation of the loan, whichever occurs first. *See* § 1635(f).

Rescinding a loan transaction under TILA "'requires unwinding the transaction in its entirety and thus requires returning the borrowers to the position they occupied prior to the loan agreement.'" *Handy v. Anchor Mortgage Corp.*, 464 F.3d 760, 765 (7th Cir. 2006) (quoting *Barrett v. JP Morgan Chase Bank, N.A.*, 445 F.3d 874, 877 (6th Cir. 2006)). TILA rescission is therefore considered a purely personal remedy. *See, e.g., McKenna*, 475 F.3d at 424-25; *James*, 621 F.2d at 731; *LaLiberte*, 53 Cal. Rptr. 3d at 750-51. It is intended to operate privately, at least initially, "with the creditor and debtor working out the logistics of a given rescission." *McKenna*, 475 F.3d at 421; *see also Belini v. Wash. Mut. Bank, FA*, 412 F.3d 17, 25 (1st Cir. 2005). Section 1635 sets forth certain deadlines and duties that apply to the creditor upon receipt of a notice of rescission from the debtor (e.g., return of earnest money, down payment, or other payments, and initiating the termination of the security interest); the statute, in

turn, specifies the duties that apply to the debtor (e.g., tendering return of the property or its reasonable value). *See* § 1635(b). These procedures apply "except when otherwise ordered by a court," *id.,* making it clear that when disagreements over the particulars of a given rescission arise, the court may tailor the remedy to the circumstances.

We note initially that the rescission remedy described in § 1635 appears to contemplate only individual proceedings; the personal character of the remedy makes it procedurally and substantively unsuited to deployment in a class action. *See also* RICHARD A. LORD, 28 WILLISTON ON CONTRACTS § 70:235 (4th ed. 2003) (noting that many consumer-credit statutes require the *individual* borrower to make the demand for rescission). Rescission is a highly individualized remedy as a general matter, and rescission under TILA is no exception. The variations in the transactional "unwinding" process that may arise from one rescission to the next make it an extremely poor fit for the class-action mechanism.

A court's certification of a class of persons entitled to seek rescission would be just the beginning. Each class member individually would have the option of exercising his or her right to rescind, and not all class members will want to do so because it requires returning the loan principle in exchange for the release of the lien and any interest or other payments. Individual controversies would erupt and likely continue because "the equitable

nature of rescission generally entitles the affected creditor to judicial consideration of the individual circumstances of the particular transaction." *McKenna*, 475 F.3d at 427 n.6. Accordingly, a host of individual proceedings would almost certainly follow in the wake of the certification of a class whose loan transactions are referable to rescission. As we have noted, § 1635(b) provides that "[t]he procedures prescribed by this subsection shall apply except when otherwise ordered by a court," suggesting that the remedy must proceed on a case-by-case basis. In short, the rescission remedy prescribed by TILA is procedurally and substantively incompatible with the class-action device.

It is true, as the Andrews point out, that TILA does not explicitly *prohibit* the use of a class action for rescission. The Supreme Court has said that "[i]n the absence of a direct expression by Congress of its intent to depart from the usual course of trying 'all suits of a civil nature' under the Rules established for that purpose, class relief is appropriate in civil actions brought in federal court." *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979) (quoting FED. R. CIV. P. 1). Some district courts have ended their inquiry there and certified rescission classes under TILA. *See, e.g.*, *In re Ameriquest Mortgage Co. Mortgage Lending Practices Litig.*, No. 05-CV-7097, 2007 WL 1202544 (N.D. Ill. Apr. 23, 2007); *Latham v. Residential Loan Ctrs. of Am., Inc.*, No. 03 C 7094, 2004 WL 1093315 (N.D. Ill. May 6, 2004); *Hickey v. Great W. Mortgage*

Corp., 158 F.R.D. 603 (N.D. Ill. 1994); *see also McKenna*, 475 F.3d at 423 (listing cases). But TILA is entirely different from the jurisdictional statute at issue in *Yamasaki*.

Yamasaki concerned a statute setting forth the procedure by which judicial review of an administrative decision could be obtained. 442 U.S. at 698. The Court rejected the argument that the statute's language authorizing a suit for judicial review by "any individual" meant that individual suits only—not class actions—could be brought. *Id.* at 698-99. The Court held that this "any individual" language, without more, did not preclude the use of class actions in this category of suit. *Id.* at 700. While an express exception might be expected in the context of a jurisdictional statute specifying the rules by which judicial review may be sought, we think § 1635 is quite different. TILA's rescission remedy "is written with the goal of making the rescission process a private one, worked out between creditor and debtor without the intervention of the courts." *Belini,* 412 F.3d at 25. The lack of an explicit prohibition against class actions in § 1635 is not dispositive. *See McKenna*, 475 F.3d at 425-26.

Class actions *are* specifically mentioned in the TILA provision addressing claims for damages. *See* § 1640(a)(2)(B). There, Congress established a cap of the lesser of $500,000 or 1 percent of the creditor's net worth on the total recovery of damages in class actions. Because vast recoveries are also possible for rescission claims (here, the Andrews estimate that

Chevy Chase's liability could amount to "perhaps $210 million"), the absence of a similar cap in § 1635 strongly suggests that class actions are not available for rescission. *See Bates v. United States*, 522 U.S. 23, 29-30 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted); *see also Duncan v. Walker*, 533 U.S. 167, 173 (2001) (where Congress distinguished between "state" and "federal" review in related subsections, that statutory context suggests that Congress would have explicitly mentioned "federal" review if it intended to include it). This direct contrast between the text of TILA's damages and rescission provisions cannot be ignored. *See McKenna*, 475 F.3d at 424.

It is of course possible (as our dissenting colleague suggests) that this difference in TILA's remedial provisions *could* be understood to mean that TILA's rescission remedy may be pursued on a class basis, without any liability limit. But we agree with the First Circuit that "[t]he notion that Congress would limit liability to $500,000 with respect to one remedy while allowing the sky to be the limit with respect to another for the same violation strains credulity." *Id.* We think the presence of a cap on class-action recovery in TILA's damages provision, the absence of *any* reference at all to class recovery in its rescission provision, and the mechanics of the rescission process spelled out in

§ 1635, all point more plausibly to the opposite interpretation: that TILA's rescission remedy—by its terms an individualized, restorative rather than compensatory remedy—is just that, a purely *individual* remedy that may not be pursued on behalf of a class.

The 1995 amendments to TILA confirm this interpretation, as the First Circuit's well-reasoned opinion in *McKenna* noted. In that year, Congress limited the potential for expansive TILA liability by temporarily suspending class actions for relatively minor violations (including some involving rescission rights) and then by increasing the tolerance levels for honest, minor mistakes in carrying out disclosure obligations. *See* Truth in Lending Class Actions Relief Act of 1995, Pub. L. No. 104-12, § 2, 109 Stat. 161, 161-62; Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, § 3, 109 Stat. 271, 272-73. These actions were taken in response to the Eleventh Circuit's decision in *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142 (11th Cir. 1994), which had held that a creditor's minor TILA violations triggered a debtor's right to rescind. *See* RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING ¶6.01[2] (Robert A. Cook et al. eds., 2000). "In taking this step, Congress made manifest that although it had designed the TILA to protect consumers, it had not intended that lenders would be made to face overwhelming liability for relatively minor violations." *McKenna,* 475 F.3d at 424.

The Andrews also make an argument flowing from the language of the "additional relief" subsection of § 1635, and the attorney's fees subsection of TILA's damages provision, § 1640. Section 1635(g) provides that "[i]n any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section 1640," that is, damages. § 1635(g). Section 1640(a)(3), in turn, provides that attorney's fees are recoverable in a successful action to enforce § 1640 liability (i.e., liability for damages) "or in any action in which a person is determined to have a right of rescission under section 1635." § 1640(a)(3). The Andrews contend that this parallel use of the phrase "in any action" in § 1635(g) and § 1640(a)(3) means that rescission is available "in any action," including class actions.

There is no support for this novel argument, which rests on a faulty reading of § 1635(g) and § 1640(a)(3), treating § 1635(g) as the center of all remedial relief available under TILA. Section 1635(g) is a simple remedial cross-reference; it provides that rescission plaintiffs may also seek damages under § 1640. It does no more. Section 1640(a)(3) simply provides that attorney's fees are recoverable in a successful action for damages *or* a successful action for rescission. It does no more. The use of the phrase "in any action" in these provisions carries no meaning for the question of whether TILA permits rescission class actions.

Finally, we note that creating a circuit split generally requires quite solid justification; we do not lightly conclude that our sister circuits are wrong. Here, the Andrews have not persuaded us that the First and Fifth Circuits have misinterpreted the operative provisions of TILA. We now join those circuits in concluding that TILA's rescission remedy, § 1635, may not be pursued on a class basis. *McKenna,* 475 F.3d at 427; *James,* 621 F.3d at 731.

We note for completeness that the fundamental incompatibility between the rescission remedy under TILA and the class-action device raises serious questions as to whether a TILA rescission class could ever be properly certified under Federal Rule of Civil Procedure 23(b).[2] A Rule

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[2] The Andrews suggest that our review is limited to the question of whether TILA permits the certification of a class of rescission plaintiffs, arguing that we may not consider on this interlocutory appeal whether a rescission class could satisfy the requirements of Rule 23. To the contrary, under Rule 23(*f*), appellate courts may grant a discretionary interlocutory appeal and may consider those issues related to a district court's certification decision. *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1802.2 (3d ed. 2005); *see also In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 106 (D.C. Cir. 2002) (holding that "review is limited to issues that relate to class certification"). Accordingly, the issue of whether a rescission class meets the requirements of Rule 23 is precisely within our purview. *In re Lorazepam*, 289 F.3d at 106-07. The same is not true, however, of the Andrews' request that we review the district court's failure to certify a class for statutory damages. The district court denied statutory damages and therefore never reached the issue of class certification for statutory damages.

23(b)(2) class may be maintained when "*final* injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2) (emphasis added); *see Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 897-98 (7th Cir. 1999) (noting Rule 23(b)(2)'s requirement of "final relief"). As we have explained, a declaration of a "rescission class" would only *initiate* a process of individual rescission actions. Significant individual aspects of the remedy, varying with each consumer's loan transaction, would remain to be worked out before each of the transactions could be unwound. Rather than settling the legal relations at issue, a judicial declaration in this situation would be essentially advisory. *See Gibbons v. Interbank Funding Group*, 208 F.R.D. 278, 285 (N.D. Cal. 2002) ("Without any rescission requests, nor subsequent denials by defendants, it is not at all clear that a justiciable controversy exists between the class and defendants."). The rescission remedy is so inherently personal that a court cannot venture further while addressing the plaintiffs as a class; it can do no more than simply declare that a certain group of plaintiffs have the right to *initiate* rescission, and that is not a form of "final" declaratory relief under Rule 23(b)(2).

Likewise, to certify a class under Rule 23(b)(3), common questions of law and fact must predominate over questions affecting individual members, and the class-action device must be superior to other methods of adjudicating the controversy. The Andrews strain to meet the predomination and superiority requirements here.

See, e.g., *In re Mex. Money Transfer Litig.*, 267 F.3d 743, 746 (7th Cir. 2001). If the class certification only serves to give rise to hundreds or thousands of individual proceedings requiring individually tailored remedies, it is hard to see how common issues predominate or how a class action would be the superior means to adjudicate the claims. The Andrews acknowledge that the district court will be called upon, if the class certification is upheld, to establish individual rescission procedures that will both meet the needs of each class member and assist Chevy Chase in recovering the loan principal on each transaction without risking the immediate loss of its security interest. Under these circumstances, proceeding as a class to "unwind" hundreds or thousands of individual credit transactions would not promote the primary purposes of the class-action mechanism: judicial economy and efficiency. *See McKenna*, 475 F.3d at 427; *see also* 1 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 1:1, at 3 (4th ed. 2002) ("A class action is a procedural device . . . that can accomplish significant judicial economies."). Using a class action to resolve a multitude of individual, varied rescission claims is neither "economical" nor "efficient" in any sense of those terms.

The Andrews argue that a class action is superior because it is the only realistic means for recovery. But they do not dispute that under TILA a prevailing debtor with a typical loan can expect to receive over $50,000, plus attorney's fees and costs, in a rescission action and that many debtors do in

fact bring rescission claims. Simply put, TILA rescission is not the sort of remedy that would not otherwise be sought unless the class-action mechanism were available.

For the foregoing reasons, we hold as a matter of law that a class action for the rescission remedy under TILA may not be maintained. The judgment of the district court is therefore REVERSED, and the case is REMANDED with instructions to vacate the class-certification order.

EVANS, *Circuit Judge*, dissenting. The majority acknowledges that the Andrews/Chevy Chase mortgage loan agreement was "complex, with a potential trap for the unwary." With that statement, I certainly agree. The loan's seductive Siren call of a 1.95 percent interest rate with a five-year fixed monthly payment of $701.21—the real implications of which were not fully explained as required by the Truth in Lending Act (TILA)—was a booby trap waiting to explode. And explode it did. So the Andrews filed this suit on behalf of themselves and others who answered the Siren call. The district court certified the case as a class action seeking rescission, but its order was stayed pending the outcome of this interlocutory appeal. Today, the majority holds that the case may not continue against the mortgagee bank as a class action for rescission. With that conclusion, I cannot agree.

At this point in time, our case presents two questions: (1) What did Congress intend?; and (2) if

its intent cannot be ascertained with certainty, who should pay the price of an ambiguous statute? As I see it, the answers to both questions favor affirming the district court's decision.

Assuming it can be fairly identified, congressional intent is the touchstone. As the majority recognizes, we must first start with the statutory language itself. If the statute is unambiguous, it controls, and a court has no business substituting its view of good policy for that of Congress. Indeed, unambiguous language must be given effect unless it produces results that are "absurd." *See Evans ex rel. Evans v. Lederle Laboratories*, 167 F.3d 1106, 1111 (7th Cir. 1999); *United States v. Thomas*, 77 F.3d 989, 992 (7th Cir. 1996). The majority found the language of 15 U.S.C. § 1635 ambiguous, and so it looked to evidence beyond the statutory text to determine congressional intent. That is not necessary. TILA *does* distinguish between claims for damages and claims for rescission, but the distinction does not support the majority's conclusion. The fact that there is a cap on damages in class actions may, in the abstract, suggest Congress sought to shield lenders from massive liability. But we don't address the matter in the abstract. Congress wrote a statute, and if it sought to further such a policy in the rescission context, we should assume it would have said so. The majority shrugs off too lightly the Supreme Court's command—"[i]n the absence of a direct expression by Congress of its intent to depart from the usual course of trying 'all suits of a civil nature'

under the Rules established for that purpose, class relief is appropriate in civil actions brought in federal court." *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979) (quoting Fed. R. Civ. P. 1). And this result can be squared with the idea that TILA rescission is a personal remedy. Affirming the district court would not mean automatic rescission of each class member's loan. The district court only held that "each class member may rescind if he or she wishes to do so." *Andrews v. Chevy Chase Bank, FSB*, 240 F.R.D. 612, 622 (E.D. Wis. 2007). What rescission would look like for each individual class member—the "unwinding" process the majority describes—may well prove too complicated to satisfy the Rule 23 dictates in a given case. But that does not mean a TILA rescission class action may not be maintained *as a matter of law*.

If we suppose that the statute is ambiguous—it may or may not authorize class actions for rescission—the majority's conclusion is still in doubt. Although the majority thinks it clear that rescission class actions are not authorized, that construction takes more than a little massaging. If the statute is unclear, the question becomes: Who should pay the price of Congress's sloppy drafting? The majority's decision places the burden on the victims of a TILA violation, not on the perpetrator of the violation. True, withholding the class action mechanism is not the same as precluding relief altogether, but it still stands as a procedural obstacle. If Congress intended to preclude rescission class actions, it should amend the statute and correct the error itself. When a court

cleans up Congress's mess, it only encourages poor drafting. And if the court gets it wrong—a hazard of judicial guesswork—then all suffer. Rather than forcing a statute to further a policy vision that may or may not be shared by Congress, it is better to acknowledge ambiguity and construe the statute in the way most supported by the statute's language and in a fashion that protects the innocent, not the guilty.

For these reasons, I dissent from the majority opinion.

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN, DATED JANUARY 16, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

SUSAN and BRYAN ANDREWS,
Plaintiffs,

v. **Case No. 05C0454**

CHEVY CHASE BANK, FSB,
Defendant.

DECISION AND ORDER

Plaintiffs Susan and Bryan Andrews bring this putative class action against defendant Chevy Chase Bank, FSB alleging that defendant violated the Truth in Lending Act ("TILA"), 15 U.S.C. 1601 et seq., in a number of respects. Before me now are the parties' cross-motions for summary judgment and plaintiffs' motion for class certification.

I. FACTS

In June 2004, plaintiffs obtained a loan from defendant, a federally chartered bank, to refinance their home in Cedarburg, Wisconsin. In April 2004,

defendant provided plaintiffs with preliminary disclosures about the loan, including a consumer handbook on adjustable rate mortgages, an adjustable rate mortgage ("ARM") disclosure and a preliminary Truth in Lending Disclosure Statement. At the closing, defendant provided plaintiffs with additional disclosures, including an Adjustable Rate Note ("ARN"), a Truth in Lending Disclosure Statement ("TILDS") and an Adjustable Rate Rider ("ARR").

Plaintiffs state that when they obtained the loan, they believed that the payments and the interest rate were fixed for five years and became variable thereafter. However, although the minimum monthly payment was fixed for five years,[1] the interest rate was not. The loan carried a discounted or "teaser" interest rate of 1.950 percent, but that rate applied only to the first monthly payment, after which the interest rate increased every month according to a formula. As the interest rate increased, an ever increasing portion of the minimum monthly payment of $701.21 was needed to cover interest, and the minimum payment itself soon became insufficient to cover accrued interest.

I will discuss additional facts in the course of the decision. In addition, to facilitate reader understanding, I include defendant's TILDS as Exhibit A at the end of this decision.

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[1] Plaintiffs had the option of paying more than the fixed minimum monthly payment.

II. SUMMARY JUDGMENT MOTIONS

I will address the parties' summary judgment motions first and then proceed to plaintiffs' motion for class certification. See Cowen v. Bank United of Tex. FSB, 70 F.3d 937, 941 (7th Cir. 1995).

A. Applicable Law

1. Summary Judgment Standard

Summary judgment is required "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The mere existence of some factual dispute does not defeat a summary judgment motion; "the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). For a dispute to be genuine, the evidence must be such that a "reasonable jury could return a verdict for the nonmoving party." Id. For the fact to be material, it must relate to a disputed matter that "might affect the outcome of the suit." Id.

In evaluating a motion for summary judgment, I must draw all inferences in a light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, I am "not required to draw every

conceivable inference from the record-only those inferences that are reasonable." Bank Leumi Le-Israel, B.M. v. Lee, 928 F.2d 232, 236 (7th Cir.1991). Where, as here, both parties move for summary judgment, both are required to show that no genuine issues of fact exist, taking the facts in the light most favorable to the party opposing each motion. If issues of fact exist, neither party is entitled to summary judgment. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 349 (7th Cir.1983).

2. TILA

Congress enacted TILA to assure meaningful disclosure of credit terms to enable consumers to become informed about the cost of loans and to compare the credit options available to them. 15 U.S.C. § 1601(a). Congress delegated broad authority to the Federal Reserve Board ("Board") to implement TILA, and the Board has exercised such authority by promulgating Regulation Z, see Regulation Z, 12 C.F.R. § 226 et seq., and through its interpretations and official staff commentary. The Board's pronouncements are entitled great weight. Ford Motor Credit Co. v. Miholin, 444 U.S. 555, 565-70 (1980).

TILA requires lenders to disclose certain information about the terms of the loan to prospective borrowers. 15 U.S.C. § 1638; 12 C.F.R. § 226.17. If a loan contains a variable rate feature, lenders must provide certain preliminary

disclosures, 12 C.F.R. § 226.19, and also disclose the existence of the feature at closing. 12. C.F.R. § 226.18. Lenders must group information required to be disclosed by § 226.18 and segregate it from other information. 12 C.F.R. § 226.17(a). Lenders often place such information on a separate sheet known as a Truth in Lending Disclosure Statement or TILDS.

All required disclosures must be clear and conspicuous. 15 U.S.C. § 1632(a); 12 C.F.R. § 226.17. A disclosure is clear if it is reasonably understandable. "If a disclosure is capable of more than one plausible interpretation, it is not clear." Elizabeth Renuart & Kathleen Keest, Truth In Lending § 4.2.4 (5th ed 2003); see also Handy v. Anchor Mortgage Corp., 464 F.3d 760, 764 (7th Cir. 2006). A disclosure is conspicuous if it "draws the consumer's attention." Renuart & Keest, supra, § 4.2.4. Thus, a lender may not disclose information so as to "obscure the relationship of the terms to each other." Commentary 226.17(a)(1).

The "sufficiency of TILA-mandated disclosures is to be viewed from the standpoint of an ordinary consumer, not the perspective of a Federal Reserve Board member, federal judge, or English professor." Smith v. Cash Store Mgmt., 195 F.3d 325, 328 (7th Cir.1999). The standard for determining whether a disclosure is sufficient is an objective one. Smith v. Check-N-Go of Ill., Inc., 200 F.3d 511 (7th Cir. 1999). Further, "whether a particular disclosure is clear for purposes of TILA is a question of law that depends

on the 'contents of the form, not on how it affects any particular reader.'" Handy, 464 F.3d at 764 (quoting Check-N-Go of Ill., Inc., 200 F.3d at 515). Similarly, whether a disclosure is conspicuous is a question of law. Check-N-Go of Ill., Inc., 200 F.3d at 515.

TILA is a remedial statute, thus, consistent with its plain language, it must be construed liberally in favor of consumers. Rossman v. Fleet Bank, 280 F.3d 384, 390 (3d Cir. 2002). A lender must comply with the letter as well as the spirit of TILA. Handy, 464 F.3d at 764. "'[A] misleading disclosure is as much a violation of TILA as a failure to disclose at all.'" Barnes v. Fleet Nat'l Bank, 370 F.3d 164, 174 (1st Cir. 2004) (quoting Smith v. Chapman, 614 F.2d 968, 977 (5th Cir.1980)).

I will discuss certain requirements of TILA in greater detail in the course of the decision.

B. Alleged TILA Violations

1. Disclosure of Payment Schedule

Plaintiffs first allege that defendant failed to disclose information concerning the loan's payment schedule as required by TILA. Title 15 U.S.C. § 1638(a)(6) requires lenders to disclose "the number, amount and due dates or period of payments scheduled to repay the total of payments." The disclosure must "reflect the terms of the legal obligations of the parties." 12 C.F.R. § 226.17(c)(1). Where, as here, a loan involves both a variable

interest rate and scheduled variations in payment amounts, the schedule of payments should "disclose the amount of any scheduled initial payments followed by an adjusted level of payments based on the initial interest rate." Commentary § 226.17(c)(1)-12. Lenders specifying the period of payments scheduled to repay a loan "as a general rule . . . must disclose the payment intervals or frequency, such as 'monthly' or 'bi-weekly,' and the calendar date that the beginning payment is due." Commentary § 226.18(g).

Information concerning the number, amount and periods of payments must be disclosed clearly and conspicuously. § 1632(a); 12 C.F.R. § 227.17. Further, lenders must group such information, see Commentary § 226.18(g) and model forms (App. H No. 12, 13), and conspicuously segregate it "from all other terms, data, or information provided in connection with a transaction." § 1638(b)(1). Lenders may group and segregate the information by enclosing it in a box, using bold print, dividing lines or setting it off in some other way. Commentary § 226.17(a)(1)-2; see also 12 C.F.R. § 226.17.

In the present case, as to the number and amount of payments, defendant properly disclosed that plaintiffs had to make sixty payments of $701.21, followed by three hundred payments at an adjusted level of $983.49. Defendant also properly based the adjusted level of payments on the initial interest rate. See Commentary § 226.17(c)(1)-12.

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With respect to payment periods, however, defendant disclosed the due dates of the first and last payments in a column in a box (known as the "federal box") on its TILDS but did not disclose the payment periods, i.e., that payments were due monthly, in either the column or the box. Thus, it would appear that defendant failed to disclose the period of payments as required by TILA. Defendant argues that its disclosures satisfy TILA because it included a sentence on its TILDS stating that "[t]his loan program allows you to select the type of payment you may make each month, in accordance with disclosures provided to you earlier," and because it provided plaintiffs with other documents indicating that they had to make monthly payments. I agree with plaintiffs.

First, the sentence on which defendant relies does not focus on payment periods but on a borrower's right to select a type of payment. The words "each month" modify the borrower's right to select. Thus, an ordinary consumer would not conclude that the sentence established an obligation to make monthly payments. Further, to the extent that the sentence relates to payment periods, it is ambiguous. An ordinary consumer would interpret the sentence's authorization to "select the type of payment you make each month" as permission to decide for herself whether to make a payment each month and in what amount. Thus, the sentence does not clearly require a borrower to pay monthly.

The sentence does not satisfy the clear and conspicuous requirement for other reasons as well. Defendant printed it in very small print and sandwiched it between the bottom of the federal box and information regarding the loan's lack of a demand feature, which defendant printed in larger print. Thus, the sentence would not draw the attention of an ordinary consumer. For this reason also, it is not conspicuous. See Van Jackson v. Check 'N Go of Ill., Inc., 193 F.R.D. 544, 548-49 (N.D. Ill. 2000) (finding TILA violation where disclosure was outside the federal box); see also Leathers v. Peoria Toyota-Volvo, 824 F. Supp. 155, 158 (C.D. Ill. 1993) (same).

In addition, because defendant located the sentence in a different place than the information concerning the number and amounts of payments, it did not group and segregate the disclosure as TILA requires, and it "obscure[d] the relationship of the terms to each other." Commentary § 226.17(a)(1).

Similarly, defendant's statements in other documents, the ARN and the ARR, that plaintiffs had to make monthly payments do not satisfy the segregation requirement. This is so because the statements would not draw the ordinary consumer's attention and because defendant did not group them with information regarding the number and amounts of payments, did not segregate the information concerning the payment schedule from the other terms of the loan and obscured the

relationship of the terms regarding payment to each other.[2]

For the foregoing reasons, defendant's disclosure of the period of payments portion of the payment schedule does not comply with TILA.

2. Disclosures of Cost of Loan as Annual Percentage Rate and Variable Interest Rate Feature

Plaintiffs also argue that defendant's disclosures of the cost of the loan as an annual percentage rate ("APR") and the loan's variable interest rate feature are not clear as required by TILA. I will consider both of plaintiffs' arguments in this section because the challenged disclosures are related and because the analyses of their clarity are largely similar.

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[2] In Hamm v. Ameriquest Mortgage Co., No 05C0227, 2005 WL 2405804 (N.D. Ill. Sept. 27, 2005), the court held that a defendant's failure to include the period of payments in its TILDS did not violate TILA because the defendant provided the information in other documents and because there was no evidence that the plaintiff was confused by the omission. However, disclosures concerning the payment schedule must be "grouped together . . . segregated from everything else." 12 C.F.R. § 226.17. Further, whether or not the borrower is confused is irrelevant. Handy, 464 F.3d at 764. Thus, Hamm appears to have been wrongly decided. See Washington v. Ameriquest Mortgage Co., No. 05C1007, 2006 WL 1980201(N.D. Ill. July 11, 2006) (rejecting Hamm).

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a. Disclosure of Cost of Loan as Annual Percentage Rate

Section 1638(a)(4) requires disclosure of the cost of a loan to the borrower "as an 'annual percentage rate' using that term." Further, where, as here, a loan's initial interest rate is subsequently adjusted, the APR must "reflect a composite annual percentage rate based on the initial rate for as long as it is charged and, for the remainder of the term, the rate that would have been applied using the index or formula at the time of consummation." Commentary § 226.(17)(C)-6. In addition, § 1638(a)(8) requires lenders to provide a brief "descriptive explanation[ ]" of the APR. See also § 226.18(e). TILA's clear and conspicuous requirement applies to the disclosure and explanation of the cost of the loan as an annual percentage rate. Commentary § 226.17(a)(1)-1.

On its TILDS, defendant stated that the APR was 4.047 percent and explained that this figure reflected the cost of the loan "as a yearly rate." Plaintiffs contend that defendant provided other information in its TILDS and other disclosures that strongly implied that the cost of the loan expressed as a yearly rate was 1.950 percent and that therefore defendant's APR disclosure is unclear. I agree. An ordinary consumer reading defendant's disclosures would be confused about the cost of the loan, expressed as an annual percentage rate.

I note first that "a misleading disclosure is as much a violation of TILA as a failure to disclose at all." Barnes, 370 F.3d at 174. Further, in determining whether a disclosure is clear as required by TILA, I may consider all of the information in a defendant's disclosures. Renuart & Keest, supra, § 4.2.4 (stating that TILA's clear and conspicuous standard requires that disclosures be understandable and that a lender which provides conflicting information about a transaction violates such standard); see also Handy, 464 F.3d at 764 (holding that where a lender provided a borrower with a correct disclosure but also provided the borrower with an incorrect form, the disclosure was unclear); Roberts v. Fleet Bank (R.I.), 342 F.3d 260, 267-68 (3d Cir. 2003) (stating that in determining whether a required disclosure is clear, a court may consider the other information that the lender provided to the borrower); Ralls v. Bank of N.Y., 230 B.R. 508, 516 (Bankr. E.D. Pa. 1999) (stating that where there was a contradiction between TILA disclosures and other information provided by the lender, the disclosures were unclear); Affatato v. Beneficial Corp., No. 96 CV 5376(NG),1998 WL 472494 (E.D.N.Y. Aug. 7, 1998) (denying motion to dismiss where the borrower alleged that the lender provided additional information which conflicted with the disclosures).

Defendant made several statements that conflicted with its disclosure that the cost of the loan as an annual percentage rate was 4.047 percent. Defendant stated on its TILDS and in other

disclosures, including its preliminary disclosures (the ARM and the preliminary TILDS) and documents that it provided at the closing (the ARN and the ARR), that the loan carried an interest rate of 1.950 percent. In no disclosure did defendant mention any other interest rate. Further, in its ARN, defendant stated that the 1.950 percent rate was a "yearly rate," the identical phrase that it used to define the APR. Thus, in addition to stating that the cost of the loan as a yearly rate was 4.047 percent, defendant suggested that the cost of the loan as a yearly rate was 1.950 percent. As previously indicated, however, the 1.950 percent rate was, in fact, a discounted or teaser rate, which applied only to the first monthly payment. However, defendant also muddied up this fact by failing to disclose, as it was required to do under § 226.19, that the rate was discounted, stating instead in its ARM only that the rate "may" have been discounted. Defendant's repeated references in its disclosures to the 1.950 percent rate, its characterization of such rate as a yearly rate and its lack of forthrightness about the discounted nature of the rate would both confuse and mislead an ordinary consumer about the cost of the loan as an annual percentage rate.[3]

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[3] Where the interest rate and the APR are merely different ways of calculating the cost of a loan as a yearly rate, disclosure of the interest rate might not confuse an ordinary consumer. See, e.g., Smith v. Anderson, 801 F.2d 661, 663-64 (4th Cir. 1986); In re Lewis, 290 B.R. 541, 549 (E.D. Pa. 2003); Robinson v. First Franklin Fin. Corp., No. 05-6652, 2006 WL 2540777, at *4 (E.D. Pa. Aug. 31, 2006). As discussed, however, in the present case, the 1.950 percent figure was a teaser rate and not the interest rate on the loan.

Finally, on the back of its TILDS, defendant made another misleading statement, which in the context of its repeated references to the 1.950 percent rate could only add to an ordinary consumer's confusion as to the cost of the loan as an annual percentage rate. Defendant stated "if interest was the only Finance Charge, then the interest rate and the Annual Percentage Rate would be the same." In fact, even if interest were the only finance charge, the annual percentage rate would not be 1.950 percent. Rather, the annual percentage rate was based on a composite of the discounted interest rate (1.950 percent) for as long as it was applied (one month) and the interest rate without the discount feature, which was much higher.

For the foregoing reasons, defendant's disclosure of the cost of the loan as an annual percentage rate was unclear.

b. Disclosure of Variable Interest Rate Feature

Plaintiffs also allege that defendant did not clearly disclose that the loan had a variable interest rate feature. If a loan has such a feature, the lender must make certain preliminary disclosures and also disclose the existence of the feature on its TILDS. 12 C.F.R. § 226.18(f). Plaintiffs allege that although defendant stated on its TILDS that the loan had a variable interest rate feature, it also included information on the TILDS which misleadingly

implied that the feature did not take effect until after the first five years of the loan. I agree.

I again note that a lender may cause a disclosure to become unclear by including conflicting information in its disclosures. See Handy, 464 F.3d at 764; Barnes, 370 F.3d at 174; Roberts, 342 F.3d at 267-68; In re Ralls, 230 B.R. at 516; Affatato, 1998 WL 472494, at *3. In the present case, defendant included information on its TILDS from which an ordinary consumer could easily infer that the interest rate on the loan was fixed for five years and became variable thereafter. Specifically, defendant stated on its TILDS that plaintiffs' loan was a "5-year fixed" loan. This statement was confusing because although it is true that the payments on the loan were fixed for five years, the interest rate was not. Defendant could easily have indicated this by including the word "payments" after the word "fixed" on its TILDS, but it did not do so. Rather than narrowing the application of "fixed," defendant used the word to describe the general nature of the loan. Further, defendant placed the "5-year fixed" language immediately above its statement that the interest rate was 1.950 percent and thus strengthened the implication that the five-year fixed language applied to the interest rate. An ordinary consumer reading defendant's TILDS could easily conclude that the interest rate was fixed for five years and variable in the last twenty-five. Further, defendant misleadingly stated in its ARN and ARR that in August 2004 the interest rate "may" change not that, as defendant well knew, it would change.

Defendant responds that it stated in other disclosures as well as the TILDS that the loan had a variable rate feature. However, to be unclear, TILA requires only that a disclosure be capable of being plausibly interpreted in more than one way. An ordinary consumer reading defendant's TILDS could plausibly conclude that the loan had a variable interest rate feature which took effect after the first five years of the loan. Therefore, defendant's disclosure violated TILA.

3. Information Added to TILDS

TILA bars a lender from adding information to its TILDS that is not "directly related" to required information. 12 C.F.R. 226.17(a). Plaintiffs argue that defendant's statement on its TILDS that the loan's interest rate was 1.950 percent violated this prohibition. In determining whether information is directly related to required information, I ask whether the added information is meaningfully connected to the required information and whether it is likely to be useful to an ordinary borrower. See, e.g., Goldberg v. Del. Olds, Inc., 670 F. Supp. 125, 129 (D. Del. 1987), aff'd, 845 F.2d 1011 (3d Cir. 1988). TILA does not require a lender to disclose a loan's interest rate. Further, in the present case, defendant was most assuredly not required to disclose the 1.950 percent rate, which applied only to the first monthly payment. However, as discussed, defendant included the 1.950 percent rate on its TILDS. Yet the 1.950 percent figure had virtually no relation to any information required to be disclosed

on the TILDS, much less a direct relation. The 1.950 percent rate had no significant connection to the cost of the loan. Moreover, a reference to the 1.950 percent rate would not be useful to an ordinary borrower because it would cause the loan to appear more attractive than it actually was and serve no useful purpose. Thus, by adding information to its TILDS that was not directly related to that required, defendant violated TILA.

4. Disclosure of Possibility of Negative Amortization

Finally, plaintiffs allege that defendant did not sufficiently disclose the consequences of negative amortization. The Commentary to 226.19(b)(2)(v) explains that "[a] creditor must disclose, where applicable, the possibility of negative amortization." Where, as here, a loan permits a borrower to make payments at a fixed level, "the creditor must fully disclose the rules relating to the option, including the effects of exercising the option (such as negative amortization will occur and the principal balance will increase)." Commentary § 226.19(2).

In its ARM disclosure, defendant stated that:

> Interest Rate changes and your ability to make less than a Fully Amortizing Payment each month, or a combination of the two, may result in the accumulation of accrued but unpaid interest ('Deferred Interest Balance').
>
> Each month that the payment option you choose is less than the entire interest portion, we will add the Deferred Interest Balance to your unpaid principal. We will also add interest on the Deferred Interest Balance to your unpaid principal each month. The interest rate on the Deferred Interest Balance will be the Fully Indexed Rate.

Although defendant did not use the language suggested by the commentary, it did inform borrowers as to what would occur if they made only the minimum monthly payments. Thus, defendant's disclosure satisfied TILA.

C. Available Remedies

As remedies for defendant's TILA violations, plaintiffs seek (1) statutory damages; (2) a declaration that they may rescind the loan; and (3) attorneys fees. Plaintiffs do not seek actual damages. Defendant argues that the remedies that plaintiffs seek are unavailable.

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1. Statutory Damages

A TILA plaintiff may recover statutory damages "only" if the defendant fails "to comply with the requirements of section 1635 . . . or of paragraph (2) (insofar as it requires a disclosure of the 'amount financed'), (3), (4), (5), (6), or (9) of section 1638(a)." 15 U.S.C. § 1640(a). In Brown v. Payday Check Advance, Inc., 202 F.3d 987, 991 (7th Cir. 2000), the Seventh Circuit held that § 1640(a)'s use of the word "'only' . . . confines statutory damages to a closed list" of violations of § 1638. See also Baker v. Sunny Chevrolet, Inc., 349 F.3d 862, 869 (6th Cir. 2003) (stating that § 1640(a) "creates two types of violations: (a) complete non-disclosure of enumerated items in § 1638(a), which is punishable by statutory damages; and (b) disclosure of the enumerated items in § 1638(a) but NOT in the manner required by the Regulation and § 1638(b)(1), which is not subject to statutory damages").

As previously discussed, defendant violated §§ 1632 and 1638(b) by failing to clearly and conspicuously disclose and segregate information relating to the payment schedule, by failing to clearly disclose the APR and the existence of a variable interest rate feature, and by adding to its TILDS information not directly related to required information. Neither violations of § 1632 or § 1638(b) are among the TILA violations enumerated in § 1640(a) for which statutory damages are available. Therefore, plaintiffs are not entitled to statutory damages.

2. **Rescission**

Under some circumstances, a TILA plaintiff may rescind a loan. 15 U.S.C. § 1635; 12 C.F.R. § 226.23. Generally, a borrower has three days to rescind after the closing or receipt of notice of the right to rescind along with all material disclosures. If a lender fails to provide a borrower with notice of the right to rescind or if the lender fails to make a material disclosure, the period in which a plaintiff may exercise the right to rescind is extended. "Material disclosures" are "the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total payments, [and] the payment schedule." 12 C.F.R. § 225.23(2). "Failure to provide information regarding the annual percentage rate also includes failure to inform the consumer of the existence of a variable rate feature." Commentary § 23(2)(3)-2. Defendant's failures to clearly and conspicuously disclose the payment period, the annual percentage rate and the variable interest rate feature all involve material disclosures for purposes of the right of rescission.[4] 12 C.F.R. § 226.23. Thus, plaintiffs may avail themselves of the remedy of rescission.

3. **Attorneys' Fees**

A TILA plaintiff may obtain attorneys' fees and costs if she is "determined to have a right of

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[4] Defendant's addition of information on its TILDS not directly related to required information does not involve a material disclosure. 12 C.F.R. § 226.23(a)(3)(n.48).

rescission under section 1635." 15 U.S.C. § 1640(3). Because I have determined that plaintiffs have a right of rescission, they are entitled to attorneys' fees.

III. MOTION FOR CLASS CERTIFICATION

A. Availability of Class Certification

In the present case, on behalf of themselves and putative class members, plaintiffs seek a declaratory judgment that they may rescind the loan. Defendant argues that a TILA plaintiff seeking a declaratory judgment that she is entitled to rescission may not utilize the class action mechanism. Although courts have analyzed the class action issue differently insofar as it relates to the right to rescind, compare James v. Home Construction of Mobile, Inc., 621 F.2d 727, 730 (5th Cir. 1980), with McKenna v. First Horizon Home Loan Corp., 429 F. Supp. 2d 291, 296 (D. Mass 2006); and Latham v. Residential Loan Ctrs. of Am., Inc., No. 03C7094, 2004 WL 1093315, at *5 (N.D. Ill. May 6, 2004), I conclude that a TILA plaintiff seeking a declaration that she may rescind a loan may represent a class.

First, "'there is nothing in the language of TILA which precludes the use of the class action mechanisms provided by Rule 23 to obtain a judicial declaration whether an infirmity in the documents, common to all members of the class, entitles each member of the class individually to seek rescission.'"

Rodrigues v. Members Mortgage Co., Inc., 226 F.R.D. 147, 153 (D. Mass. 2005) (quoting Williams v. Empire Funding Corp., 183 F.R.D. 428, 436 (E.D. Pa. 1998)). I do not find it significant that Congress referred to class actions when in 1974 it amended § 1640 to set a damages cap but made no comparable reference when it subsequently amended § 1635, which governs rescission claims. It is just as likely that Congress did not intend to limit rescission claims in any way. McKenna, 429 F. Supp. 2d at 291.

Second, assuming a TILA plaintiff can satisfy the requirements of Fed. R. Civ. P. 23, public policy strongly favors allowing class actions in cases like the present one. Class actions serve the purpose of providing compensation in cases involving public wrongs and widespread injuries. There is no reason why a plaintiff who alleges that a defendant has violated TILA and caused widespread injuries should not be able to bring a class action. Denial of class action status would reward defendants who may have committed wrongs and leave victims who may have been wronged uncompensated. Note, Class Actions Under the Truth in Lending Act, 83 Yale L.J. 1416, 1435 (1974).

B. Requirements for Class Certification

In order to obtain class certification, plaintiffs must satisfy several requirements. First, they must have standing to sue. Rozema v. Marshfield Clinic, 174 F.R.D. 425, 432 (W.D. Wis. 1997). The facts

previously discussed indicate that plaintiffs have standing. In addition, plaintiffs must satisfy the criteria in Fed. R. Civ. P. 23. Rule 23(a) requires plaintiffs to establish (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. If they satisfy these requirements, they must also meet one of the requirements of Rule 23(b). In addition, it is implicit in Rule 23 that plaintiffs establish the existence of a definable class. Rosario v. Livaditis, 963 F.2d 1013, 1017 (7th Cir. 1992).

1. Fed. R. Civ. P. 23(a)

a. Numerosity

Rule 23(a)(1) requires that potential class members be "so numerous that joinder of all members is impracticable." To satisfy this requirement, a plaintiff need only show that joinder would be difficult or inconvenient. Robidoux v. Celani, 987 F.2d 931, 935 (2nd Cir. 1993). A plaintiff will generally meet the requirement by showing that the putative class consists of forty or more. Clarke v. Ford Motor Co., 220 F.R.D. 568, 578 (E.D. Wis. 2004). In the present case, plaintiffs present evidence that defendant extended about 7,000 loans in which the TILA disclosure contained some or all of the deficiencies discussed above. Thus, plaintiffs satisfy the numerosity requirement.

b. **Commonality**

Rule 23(a)(2) requires the existence of "questions of law or fact common to the class." Generally, the presence of a single common legal or factual question is sufficient. Clarke, 220 F.R.D. at 579 (stating that the commonality requirement is not demanding because it may be satisfied by a single common issue). Rule 23(a)(2) generally looks to whether the defendant's conduct is common to class members, rather than to whether the result of the conduct is uniform among class members. Rosario, 963 F.2d at 1018. In the present case, whether defendant's disclosures of the payment schedule, the cost of the loan as an annual percentage rate and the variable interest rate feature of the loan violated TILA is a question common to the class.

Defendant argues that plaintiffs fail to establish commonality because rescission is a personal and equitable remedy, which is only available based on the particular facts of a case. However, plaintiffs do not seek rescission of an entire class of transactions but only a declaration that each class member may rescind if he or she wishes to do so. See, e.g., Williams, 183 F.R.D. at 435; see also McIntosh v. Irwin Union Bank & Tr. Co., 215 F.R.D. 26, 33 (D. Mass 2003). As the Williams court explained:

> plaintiffs only seek a declaration that . . . each member of the class is entitled

> to seek rescission. Should the Court declare that, indeed, plaintiffs are entitled to seek rescission because of certain infirmities in the TILA disclosure documents, then each class member, individually, and not as a member of the class, would have the option to exercise his or her right to seek rescission.

183 F.R.D. at 435-36. Further, as to any member of the class who sought to exercise his or her statutory right to rescind, defendant would be entitled to exercise any right it had under the statute.

Thus, plaintiffs satisfy the commonality requirement.

c. Typicality

Rule 23(a)(3) requires that the claims of the class representative be "typical of the claims . . . of the class." Typicality does not require a complete identity of claims. Clarke, 220 F.R.D. at 579 (stating that typicality does not require that the named plaintiff be in the same position as every member of the class). Rather, the critical inquiry is whether the class representative's claims have the same essential characteristics as those of the putative class. Id. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality. Since the claims only need to share the same essential characteristics and need

not be identical, the typicality requirement is not highly demanding. Id. In the present case, plaintiffs' claims and those of members of the putative class arise out of the same documents and are based on the same legal theory. Therefore, plaintiffs meet their burden of establishing typicality.

d. Adequacy of Representation

Rule 23(a)(4) requires that the representative parties "fairly and adequately protect the interests of the class." In determining the adequacy of representation, courts consider the adequacy of the class representative and of class counsel. Retired Chi. Police Ass'n v. City of Chi., 7 F.3d 584, 596 (7th Cir. 1993). The interest of the representative must not conflict with those of the class and class counsel must be qualified. In the present case, both plaintiffs and class counsel present evidence supporting their adequacy. Plaintiffs submit affidavits attesting to their commitment to the class, and counsel submits evidence of prior relevant experience. Thus, plaintiffs satisfy the requirement of Rule 23(a)(4).

2. Rule 23(b)

In order to obtain class certification, a plaintiff must also satisfy the requirements of one of the subsections of Rule 23(b). In the present case, plaintiffs seeks certification under Rule 23(b)(2) or, alternatively, under Rule 23(b)(3).

There are significant distinctions between class actions certified under Rule 23(b)(2) and those certified under subdivision (b)(3). Rule 23(b)(3) is so general that it encompasses all class actions, whereas actions certified under subdivision (b)(2) represent specialized categories of class actions. Unlike actions certified under Rule 23(b)(3), in Rule 23(b)(2) actions, it is not mandatory to give notice of the pendency of the action to class members, class members do not have the right to opt out of the action prior to judgment on the merits, and certification is less burdensome on the parties and the court. Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 4:19 (4th ed. 2002).

Thus, actions that qualify for class certification under subdivision (b)(2) should not generally be certified under subdivision (b)(3). Id.; VanGemert v. Boeing Co., 259 F. Supp. 125, 130-31 (S.D.N.Y. 1966) (articulating principle that actions under subdivisions (b)(1) and (b)(2) are preferred over suits under (b)(3)); see also Specialty Cabinets & Fixtures, Inc. v. Am. Equitable Life Ins. Co., 140 F.R.D. 474, 477 (S.D. Ga. 1991) (stating that it is desirable to certify class actions under subdivisions (b)(1) or (2) because its members do not have right to exclude themselves from binding effect of class action judgment). Thus, I ask first whether the present action is certifiable under subdivision (b)(2).

Rule 23(b)(2) provides that an action may be maintained as a class action if "the party opposing

the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Thus, in the present case, certification is proper under the rule if defendant's inaction with respect to plaintiffs affected the entire class and if declaratory relief would be appropriate for the entire class. Plaintiffs allege that defendant has contested their TILA claims and that defendant's arguments would be largely the same with respect to each class member. Thus, defendant has "refused to act on grounds generally applicable to the class," id., and the first requirement of Rule 23(b) is satisfied.

I now ask whether declaratory relief is appropriate with respect to the entire class. The principal criteria for determining whether declaratory relief is appropriate are whether the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and whether it will terminate the uncertainty giving rise to the proceeding. Gammon v. GC Servs. Ltd. P'ship, 162 F.R.D. 313, 320 (N.D. Ill. 1995). In the present case, a declaratory judgment would settle the issue of whether defendant violated TILA and, if so, whether such violation gives rise to the right to rescind. Therefore, declaratory relief is appropriate with respect to the entire class.

Thus, I conclude that plaintiffs are entitled to class certification under Rule 23(b)(2).

C. Definition of Class

The definition of a class must be precise enough to enable the court to determine whether at any given time a particular individual is or is not a member of the class. See Alliance to End Repression v. Rochford, 565 F.2d 975, 977 (7th Cir. 1977). A court must be able to resolve the question of an individual's membership by reference to objective criteria. Elliott v. ITT Corp., 150 F.R.D. 569, 574 (N.D. Ill. 1992). However, when a plaintiff attempts to certify a class under Rule 23(b)(2) for the purpose of seeking injunctive or declaratory relief, a precise class definition is less critical. See Battle v. Commonw. of Pa., 629 F.2d 269, 271 n.1 (3rd Cir. 1980). The fact that a class includes persons who will become members in the future does not render it impermissibly indefinite. Probe v. State Teacher's Ret. Sys., 780 F.2d 776, 780 (9th Cir. 1986).

In the present case, I conclude that it is appropriate to include in the class those persons (1) who obtained an adjustable rate mortgage from defendant on their primary residence, (2) between April 20, 2004 and the date of class certification, and (3) who received a TILDS that contained language identical to that of any one of the three material disclosures[5] that I have found deficient.

---

[5] Defendant argues that some borrowers received a TILDS which included "pa" or "pay" next to the "5-year fixed" language, and that I should not include such borrowers in the class because the additional language might change both the clarity and the typicality analyses. Although neither party has

D. Notice to Class Members

Although it is not mandatory to notify members of a class certified under Rule 23(b) of the pendency of the action, it is necessary to provide such notice in the present case so that class members will learn of their right to rescind. Moreover, I am authorized to make an appropriate order regarding notice under Rule 23(d)(2)a. However, before entering such an order, I wish to hear from the parties concerning what sort of notice is appropriate. Therefore, plaintiffs should file a proposal regarding notice by **February 2, 2007**. Defendant may file a response by **February 16, 2007**, and plaintiffs may reply by **March 2, 2007**.

IV. CONCLUSION

Therefore, for the reasons stated,

IT IS ORDERED that plaintiffs' and defendant's motions for summary judgment are **GRANTED IN PART AND DENIED IN PART** as stated above.

IT IS FURTHER ORDERED that plaintiffs' motion for class certification is **GRANTED** as stated above.

---

provided me with a copy of a TILDS containing such language or discussed the matter in depth, I tend to agree with defendant. Therefore, I decline to include persons who received disclosures of this type in the class.

FINALLY, IT IS ORDERED that the parties advise the court concerning notification of class members as stated above.

Dated at Milwaukee, Wisconsin this 16 day of January, 2007.

/s______________________________
LYNN ADELMAN
District Judge

EXHIPIT A

554067397

TRUTH IN LENDING DISCLOSURE STATEMENT

(THIS IS NEITHER A CONTRACT NOR A COMMITMENT TO LEND)

__ Preliminary XX Final

LENDER: Chevy Chase Bank, F.S.B.
7501 Wisconsin Avenue
Bethesda, MD 20814

DATE 06/08/2004
LOAN NO. 554067397
Type of Loan WS CashFlow 5-Year Fixed
Note Interest Rate: 1.950%

BORROWERS BRYAN M. ANDREWS and SUSAN R. ANDREWS

ADDRESS 6610 KINGSWOOD DR.
CITY STATE / ZIP CEDARBURG, WI 53012
PROPERTY 6610 KINGSWOOD DR., CEDARBURG, WI 53012

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	Amount Financed	Total of Payments
The cost of your credit as a yearly rate, which is subject to change.	The dollar amount the credit will cost you.	The amount of credit provided to you or on your behalf.	The amount you will have paid after you have made all payments as scheduled.
4.047 %	$ 147,597.14	$ 189,521.10	$ 337,118.24

PAYMENT SCHEDULE:

NUMBER OF PAYMENTS	AMOUNT OF PAYMENTS	PAYMENTS ARE DUE BEGINNING	NUMBER OF PAYMENTS	AMOUNT OF PAYMENTS	PAYMENTS ARE DUE BEGINNING
60	701.21	08/01/2004			
300	983.49	08/01/2009			

This loan program allows you to select the type of payment you make each month, in accordance with disclosures provided to you earlier.

DEMAND FEATURE: [XX] This loan does not have a Demand Feature. [ ] This loan has a Demand Feature as follows:

VARIABLE RATE FEATURE:

[XX] This Loan has a Variable Rate Feature. Variable Rate Disclosures have been provided to you earlier.

SECURITY: You are giving a security interest in the property located at:
6610 KINGSWOOD DR., CEDARBURG, WI 53012

ASSUMPTION: Someone buying this property [ ] cannot assume the remaining balance due under original mortgage terms
[XX] may assume, subject to lender's conditions, the remaining balance due under original mortgage terms.

FILING / RECORDING FEES: $ 30.00

PROPERTY INSURANCE: [XX] Property hazard insurance in the amount of $ replacement cost with a loss payable clause to the lender is a required condition of this loan. Borrower may purchase this insurance from any insurance company acceptable to the lender.
Hazard insurance [ ] is [XX] is not available through the lender at an estimated cost of for a year term.

LATE CHARGES: If your payment is more than 15 days late, you will be charged a late charge of 5.000 % of the overdue payment.

PREPAYMENT: If you pay off your loan early, you
[XX] may [ ] will not have to pay a penalty.
[ ] may [XX] will not be entitled to a refund of part of the finance charge.

See your contract documents for any additional information regarding non-payment, default, required repayment in full before scheduled date, and prepayment refunds and penalties.
e means estimate

I/We hereby acknowledge reading and receiving a complete copy of this disclosure.

Bryan M. Andrews 6/9/04 Susan R. Andrews 6-9-04

BRYAN M. ANDREWS BORROWER / DATE SUSAN R. ANDREWS BORROWER / DATE

BORROWER / DATE BORROWER / DATE

-788 10872606 [illegible] 06/07/04 17:20 8/03

[illegible]

52A

BEST AVAILABLE COPY

APPENDIX C – MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN, DATED FEBRUARY 14, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

SUSAN and BRYAN ANDREWS,
Plaintiffs,

vi. **Case No. 05C0454**

CHEVY CHASE BANK, FSB,
Defendant.

MEMORANDUM

On January 16, 2007, I concluded that defendant violated the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 et seq., in several respects. I also concluded that a number of the violations were material as defined in § 1638(f) and 12 C.F.R. § 226.23 and, as a result, extended by three years the time that borrowers aggrieved by such violations had to exercise their right of rescission pursuant to § 1635. Pursuant to Fed. R. Civ. P. 23(b)(2), I certified a class of such borrowers, leaving the decision as to whether to actually seek rescission to each individual class member.

Defendant appealed my decision certifying a class, and pursuant to Fed. R. Civ. P. 23(f), the court of appeals permitted the appeal. Subsequently, also pursuant to Rule 23(f), defendant asked me to stay proceedings in this court pending appeal. On February 3, 2007, I granted the stay, and in the present memorandum I explain my reasons for doing so.

In determining whether to grant defendant's request for a stay, I applied the balancing test applicable to injunctions and other stays pending appeal. See In re Lorazepam & Clorazepate Antitrust Litig., 208 F.R.D. 1, 3 (D.D.C. 2002). The balancing test requires consideration of:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

In re Application of Proctor & Gamble Co., 334 F. Supp. 2d 1112, 1117 (E.D. Wis. 2004) (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)).

Appendix C

A. Likelihood of Success on Appeal

I first discuss the likelihood that defendant will succeed on appeal. Defendant argued that it is likely to succeed on appeal because (1) TILA bars certification of a class of borrowers who have the right to seek rescission, and (2) even if TILA does not bar certification of such a class, I defined the class too broadly. Notwithstanding McKenna v. First Horizon Home Loan Corp., No. 06-808, 2007 WL 210850 (1st Cir. Jan. 29, 2007), I found defendant's first argument unpersuasive. With all due respect to the First Circuit, nothing in the text of TILA supports the proposition that TILA bars courts from certifying classes whose members may seek rescission. Moreover, in concluding that TILA bars certification of such classes, the McKenna court used legislative intent and legislative history in a way that the Seventh Circuit has condemned.

Congress enacted TILA in 1968. Initially fearful that sizeable damage awards could harm the credit industry, some district courts found that TILA did not permit class actions, and others found various reasons for denying class certification. See, e.g., Ratner v. Chem. Bank, N.Y. Trust Co., 329 F. Supp. 270, 274 (S.D.N.Y. 1974). However, in Wilcox v. Commerce Bank of Kansas City, 474 F.2d 336, 344 (10th Cir. 1973), the Tenth Circuit rejected the notion that TILA prohibited class actions, concluding that "there is nothing in the Act itself, the Rule [Rule 23] or the notes of the Advisory Committee on Rules of Civil Procedure with respect to it which

expressly or impliedly precludes class actions of this type of case." Id. Noting the relative absence of recorded legislative intent, the court concluded that "[t]o find any congressional intent to preclude at all events treatment of such cases under Rule 23 would be a work of clairvoyance and not of construction or interpretation." Id. Thus, the court concluded that under TILA district courts should certify classes if the requirements of Rule 23 were satisfied.

The Seventh Circuit reached the same conclusion. In Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161, 1163 (7th Cir. 1974), the court stated that "the trial court's decision to deny class action status in this case was posited on the legal theory that the procedural device of class actions is incompatible with the substantive ends to which the Truth in Lending Act is addressed. We cannot agree." The Haynes court based its decision on three factors: (1) that plaintiffs had long used class actions extensively in antitrust and securities litigation without special legislative authorization, and although cognizant of such activity, Congress in enacting TILA said nothing suggesting that it intended a different result under TILA; (2) that TILA had a dual purpose of providing incentives to private litigants and inducing creditor compliance, thus "creditors disregarding their responsibilities under the Act and causing damages to members of a class however limited or extensive should have no assurance that their accumulated responsibility cannot be enforced through this means"; and (3) that

although it was important not to harm the credit industry, "it is at least equally important to prevent violators of the Act from limiting recovery to a few individuals where actual, wide-spread noncompliance is found to exist." Id. at 1163-64.

In 1974, Congress amended TILA, limiting the potential liability of lenders by capping statutory damages in class actions. However, Congress did not bar TILA class actions either in damage cases or where the violation gives rise to a right of rescission. Subsequently, the Seventh Circuit reiterated its position that TILA does not bar class actions and that in determining whether to certify classes in TILA cases, district courts should only consider whether the requirements of Rule 23 are met. Goldman v. First Nat'l Bank of Chi., 532 F.2d 10, 14-15 (7th Cir. 1976). Other circuits agree. See, e.g., Johnson v. West Suburban Bank, 225 F.3d 366, 371 (3d Cir. 2000) (stating that "although the statute clearly contemplates class actions, there are no provisions within the law that create a right to bring them. . . . The 'right' to proceed as a class action, insofar as the TILA is concerned, is a procedural one that arises from the Federal Rules of Civil Procedure."). Nevertheless, from the fact that the 1974 amendment imposed a cap on statutory damages in class actions seeking damages (but made no mention of class actions involving the right of rescission), the McKenna court inferred that Congress intended to bar class actions in TILA cases where rescission is the only available remedy. However, nothing in the text of the amendment

justifies this inference. It is just as likely that Congress remained silent about class actions involving the right of rescission because it did not regard such actions as posing the same economic threat to the credit industry as class actions involving damages or because it never considered the issue.

Congress also amended TILA in 1995 in response to Rodash v. AIB Mortgage Co., 16 F.3d 1142 (11th Cir. 1994), in which the Eleventh Circuit authorized a borrower to rescind based on a minor TILA violation. Specifically, Congress initially enacted a six month moratorium on class actions involving minor TILA violations and subsequently limited the grounds on which a borrower could rescind as well as making several other changes in the law. Again, however, Congress did not bar class actions involving the right of rescission. Nevertheless, the McKenna court relied on the 1995 amendment to bolster its conclusion that Congress intended to preclude TILA class actions involving the right to rescind. However, like the 1974 amendment, the 1995 amendment does not bear the weight the McKenna court placed on it.

The McKenna court inferred a congressional intent to bar district courts from certifying classes whose members may seek rescission based on what "it gleaned from the legislative history" of the 1974 and 1995 amendments. McKenna, 2007 WL 210850, at *6. However, in seeking to ascertain legislative intent, the court misunderstood that "the search is

not for the contents of the authors' heads," Matter of Sinclair, 870 F.2d 1340, 1342 (7th Cir. 1989), but for "what Congress meant by what it said." Id. at 1343 (emphasis added). Where the language of a statute is plain and does not lead to an absurd result, the language itself "is the sole evidence of the ultimate legislative intent." Id. at 1344 (quoting Caminetti v. United States, 242 U.S. 470, 490 (1917)). The language of TILA is plain. It does not bar courts from certifying classes whose members have a right to rescind. Nor is the absence of such a bar absurd. In sum, the McKenna court should have asked "what the statute means" rather than "what the legislature meant." Id. at 1343 (quoting Oliver Wendell Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417, 417-19 (1899), reprinted in Collected Legal Papers, 204, 207 (1920)).

The McKenna court also used legislative history improperly. Legislative history may illuminate the meaning of a text, but it cannot be used to create a rule not found in the text. See id. at 1344 (stating that legislative history "is not a source of legal rules competing with those found in the United States Code"). Both the 1974 and 1995 amendments to TILA demonstrate that Congress chose to accomplish the goal of limiting lender liability by means other than prohibiting courts from certifying classes whose members may seek rescission. As the Seventh Circuit recently indicated, the fact that a statute subjects a party to severe liability does not give courts a license not to enforce it. See Murray v. GMAC Mortgage Corp.,

434 F.3d 948, 953-54 (7th Cir. 2006) (stating that if Congress wishes to amend a statute to limit liability, if of course may do so, but that "while a statute remains on the books, however, it must be enforced rather than subverted."). By relying on legislative history to reach the contrary conclusion, the McKenna court engaged in "clairvoyance . . . not . . . construction or interpretation." Wilcox, 474 F.2d at 344.

Toward the end of its decision, the McKenna court made an observation that illustrates the problematic nature of its use of legislative intent and legislative history. The court stated: "Last – but not least – we note that the TILA already includes significant incentives for creditor compliance with its strictures, thus casting serious doubt on the need for a class-action mechanism with respect to rescission." (footnote omitted.) McKenna, 2007 WL 210850, at *7. Once again, with all due respect, the question of what mechanisms are needed to obtain creditor compliance with federal banking requirements is for Congress, not the courts to determine.[1]

---

[1] The McKenna court also likely exaggerated the potential harm to lenders from courts certifying classes whose members may rescind. As the court itself noted, not all borrowers will choose to rescind loans. In addition, in some cases, it is likely that the strict three year period for rescission will have run. See Beach v. Ocwen Fed. Bank, 523 U.S. 410, 419 (1998) (stating that TILA does not permit rescission "after the 3-year period of § 1635(f) has run"). Further, rescission is an equitable remedy, and in determining whether to grant rescission and on what terms, courts may consider the individual circumstances of the case before them.

With respect to the propriety of certification under Rule 23, the McKenna court also stated that it saw no meaningful distinction "between a suit for a declaratory judgment that rescission is possible and a suit for rescission simpliciter," id., and thus declined to distinguish James v. Home Construction Company of Mobile, Inc., 621 F.2d 727, 731 (5th Cir. 1980), which involved the latter. In refusing to distinguish declaratory actions from rescission actions, the McKenna court relied on the need to shield lenders from liability and the personal nature of the rescission remedy. McKenna, 2007 WL 210850, at *6. However, as we have seen, it is not the business of courts to shield lenders from liability in ways that Congress has not. Further, the personal aspects of rescission do not come into play in a declaratory action but only after a borrower actually attempts to rescind. There is nothing personal about declaring that a class of borrowers who received the same misleading disclosure incurred a TILA violation and that as a result the statutory right to rescind is extended from three days to three years. In fact, the creation of such a declaratory class promotes the goals of TILA and Rule 23 because it provides a mechanism for notifying borrowers of the violation. Further, as in the present case, TILA plaintiffs often seek both statutory damages and a declaration that a lender's alleged violations are material for purposes of rescission. In such cases, it makes little sense to preclude a court already deciding whether borrowers seeking statutory damages constitute a class from

determining whether a common violation is material for purposes of extending the rescission period.

For the reasons stated, I concluded that defendant should not prevail on appeal based on McKenna. However, I recognized that the Seventh Circuit may disagree with me and agree with a sister circuit. Further, I agreed with defendant that I likely defined the class too broadly, and that if the class action survives, the class definition will have to be narrowed. I did not take into account that TILA prohibits certain borrowers from rescinding, i.e., if their loan is for the purpose of construction or purchase, § 1635(e)(1), or involves a refinancing by the lender who made the initial loan and is secured by the same collateral. § 1635(e)(2). Thus, the class should include only borrowers who refinanced a loan with a different lender or refinanced a loan with the same lender but secured it with different collateral.

B. Irreparable Injury/Public Interest

I discuss the irreparable injury and public interest factors together as they are related. Defendant argued that it would be irreparably injured absent a stay because it would have to send notices, provide discovery and respond to claims even though the class action might not proceed. Plaintiffs argued that they would be irreparably harmed by a stay because the three year limitation period, which begins to run in April 2007, would run out on some class members before they were made aware of their right to rescind. Although I considered

it a close question, I ultimately concluded that the need to clarify whether a court could certify a class whose members have a right to rescind tipped the balance slightly in favor of defendant.

C. Conclusion

For the reasons stated, I concluded that I should grant defendant's request for a stay pending appeal.

Dated at Milwaukee, Wisconsin this 14 day of February, 2007.

/s______________________
LYNN ADELMAN
District Judge

Appendix D

APPENDIX D – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT GRANTING LEAVE TO APPEAL, DATED JANUARY 31, 2007

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 31, 2007

Before

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

IN RE:	]	Petition for
CHEVY CHASE BANK,	]	Permission to
Petitioner.	]	Appeal Pursuant
	]	to F.R.C.P. 23(f)
	]	Eastern District of
	]	Wisconsin.
No. 07-8001	]	
	]	05 C 454
	]	
	]	Lynn Adelman,
	]	Judge.

Upon consideration of the **DEFENDANT-PETITIONER CHEVY CHASE BANK'S PETITION**

FOR LEAVE TO APPEAL PURSUANT TO RULE 23(f), filed on January 25, 2007, by counsel for the petitioner,

IT IS ORDERED that the petition is **GRANTED**. Petitioner shall pay the required appellate fees to the clerk of the district court within ten days from the entry of this order pursuant to Federal Rule of Appellate Procedure 5(d)(1). Once the district court notifies this court that the fees have been paid, the appeal will be entered on this court's general docket.

APPENDIX E – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING REHEARING AND REHEARING EN BANC, DATED OCTOBER 31, 2008

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 31, 2008

Before

DANIEL A. MANION, *Circuit Judge*

TERENCE T. EVANS, Circuit Judge

DIANE S. SYKES, *Circuit Judge*

No. 07-1326

BRYAN ANDREWS and SUSAN ANDREWS, *Plaintiffs-Appellees,*	Appeal from the United States District Court for the Eastern District of Wisconsin.
v.	No. 05 C 454
CHEVY CHASE BANK, Defendant-Appellant.	Lynn Adelman, *Judge.*

Appendix E

ORDER

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc.* Circuit Judges Daniel A. Manion and Diane S. Sykes have voted to deny rehearing; Circuit Judge Terence T. Evans voted to grant rehearing.

It is therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.

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* Circuit Judge Joel M. Flaum did not participate in the consideration of the petition for rehearing en banc.

APPENDIX F – STATUTES INVOLVED

15 U.S.C. § 1605

Sec. 1605. Determination of finance charge

. . .

(f) Tolerances for accuracy

In connection with credit transactions not under an open end credit plan that are secured by real property or a dwelling, the disclosure of the finance charge and other disclosures affected by any finance
charge—

(1) shall be treated as being accurate for purposes of this subchapter if the amount disclosed as the finance charge—

(A) does not vary from the actual finance charge by more than $100; or

(B) is greater than the amount required to be disclosed under this subchapter; and

(2) shall be treated as being accurate for purposes of section 1635 of this title if—

(A) except as provided in subparagraph (B), the amount disclosed as the finance

charge does not vary from the actual finance charge by more than an amount equal to one-half of one percent of the total amount of credit extended; or

(B) in the case of a transaction, other than a mortgage referred to in section 1602(aa) of this title, which—

(i) is a refinancing of the principal balance then due and any accrued and unpaid finance charges of a residential mortgage transaction as defined in section 1602(w) of this title, or is any subsequent refinancing of such a transaction; and

(ii) does not provide any new consolidation or new advance;

if the amount disclosed as the finance charge does not vary from the actual finance charge by more than an amount equal to one percent of the total amount of credit extended.

15 U.S.C. § 1635

Sec. 1635. Right of rescission as to certain transactions

(a) Disclosure of obligor's right to rescind

Appendix F

Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

(b) Return of money or property following rescission

When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void

upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

(c) Rebuttable presumption of delivery of required disclosures

Notwithstanding any rule of evidence, written acknowledgment of receipt of any disclosures required under this subchapter by a person to whom information, forms, and a statement is required to be given pursuant to this section does no more than create a rebuttable presumption of delivery thereof.

(d) Modification and waiver of rights

The Board may, if it finds that such action is necessary in order to permit homeowners to meet bona fide personal financial emergencies, prescribe regulations authorizing the modification or waiver of any rights created under this section to the extent and under the circumstances set forth in those regulations.

(e) Exempted transactions; reapplication of provisions

This section does not apply to—

(1) a residential mortgage transaction as defined in section 1602(w) of this title;

(2) a transaction which constitutes a refinancing or consolidation (with no new advances) of the principal balance then due and any accrued and unpaid finance charges of an existing extension of credit by the same creditor secured by an interest in the same property;

(3) a transaction in which an agency of a State is the creditor; or

(4) advances under a preexisting open end credit plan if a security interest has already been retained or acquired and such advances

are in accordance with a previously established credit limit for such plan.

(f) Time limit for exercise of right

An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor, except that if (1) any agency empowered to enforce the provisions of this subchapter institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction, (2) such agency finds a violation of this section, and (3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding, then the obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later.

(g) Additional relief

In any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section

1640 of this title for violations of this subchapter not relating to the right to rescind.

(h) Limitation on rescission

An obligor shall have no rescission rights arising solely from the form of written notice used by the creditor to inform the obligor of the rights of the obligor under this section, if the creditor provided the obligor the appropriate form of written notice published and adopted by the Board, or a comparable written notice of the rights of the obligor, that was properly completed by the creditor, and otherwise complied with all other requirements of this section regarding notice.

(i) Rescission rights in foreclosure

(1) In general

Notwithstanding section 1649 of this title, and subject to the time period provided in subsection (f) of this section, in addition to any other right of rescission available under this section for a transaction, after the initiation of any judicial or nonjudicial foreclosure process on the primary dwelling of an obligor securing an extension of credit, the obligor shall have a right to rescind the transaction equivalent to other rescission rights provided by this section, if—

(A) a mortgage broker fee is not included in the finance charge in accordance with the laws and regulations in effect at the time the consumer credit transaction was consummated; or

(B) the form of notice of rescission for the transaction is not the appropriate form of written notice published and adopted by the Board or a comparable written notice, and otherwise complied with all the requirements of this section regarding notice.

(2) Tolerance for disclosures

Notwithstanding section 1605(f) of this title, and subject to the time period provided in subsection (f) of this section, for the purposes of exercising any rescission rights after the initiation of any judicial or nonjudicial foreclosure process on the principal dwelling of the obligor securing an extension of credit, the disclosure of the finance charge and other disclosures affected by any finance charge shall be treated as being accurate for purposes of this section if the amount disclosed as the finance charge does not vary from the actual finance charge by more than $35 or is greater than the amount required to be disclosed under this subchapter.

(3) Right of recoupment under State law

Nothing in this subsection affects a consumer's right of rescission in recoupment under State law.

(4) Applicability

This subsection shall apply to all consumer credit transactions in existence or consummated on or after September 30, 1995.

15 U.S.C. § 1640

Sec. 1640. Civil liability

(a) Individual or class action for damages; amount of award; factors determining amount of award

Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of the failure;

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in

connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $400 or greater than $4,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor;

(3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 of this title, the costs of the action, together with a reasonable attorney's fee as determined by the court; and

(4) in the case of a failure to comply with any requirement under section 1639 of this title,

> an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional. In connection with the disclosures referred to in subsections (a) and (b) of section 1637 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title, section 1637(a) of this title, or of paragraph (4), (5), (6), (7), (8), (9), or (10) of section 1637(b) of this title or for failing to comply with disclosure requirements under State law for any term or item which the Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms or items referred to in section 1637(a) of this title or any of those paragraphs of section 1637(b) of this title. In connection with the disclosures referred to in subsection (c) or (d) of section 1637 of this title, a card issuer shall have a liability under this section only to a cardholder who pays a fee described in section 1637(c)(1)(A)(ii)(I) or section 1637(c)(4)(A)(i) of this title or who uses the credit card or charge card. In connection with the disclosures referred to

in section 1638 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as it requires a disclosure of the "amount financed"), (3), (4), (5), (6), or (9) of section 1638(a) of this title, or section 1638(b)(2)(C)(ii) of this title, or for failing to comply with disclosure requirements under State law for any term which the Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms referred to in any of those paragraphs of section 1638(a) of this title or section 1638(b)(2)(C)(ii) of this title. With respect to any failure to make disclosures required under this part or part D or E of this subchapter, liability shall be imposed only upon the creditor required to make disclosure, except as provided in section 1641 of this title.

. . .

(i) Class action moratorium

(1) In general

During the period beginning on May 18, 1995, and ending on October 1, 1995, no court may enter any order certifying any class in any action under this subchapter—

(A) which is brought in connection with any credit transaction not under an open end credit plan which is secured

by a first lien on real property or a dwelling and constitutes a refinancing or consolidation of an existing extension of credit; and

(B) which is based on the alleged failure of a creditor—

(i) to include a charge actually incurred (in connection with the transaction) in the finance charge disclosed pursuant to section 1638 of this title;

(ii) to properly make any other disclosure required under section 1638 of this title as a result of the failure described in clause (i); or

(iii) to provide proper notice of rescission rights under section 1635(a) of this title due to the selection by the creditor of the incorrect form from among the model forms prescribed by the Board or from among forms based on such model forms.

(2) Exceptions for certain alleged violations

Paragraph (1) shall not apply with respect to any action—

(A) described in clause (i) or (ii) of paragraph (1)(B), if the amount disclosed as the finance charge results in an annual percentage rate that exceeds the tolerance provided in section 1606(c) of this title; or

(B) described in paragraph (1)(B)(iii), if—

(i) no notice relating to rescission rights under section 1635(a) of this title was provided in any form; or

(ii) proper notice was not provided for any reason other than the reason described in such paragraph.

15 U.S.C. § 1649

Sec. 1649. Certain limitations on liability

(a) Limitations on liability

For any closed end consumer credit transaction that is secured by real property or a dwelling, that is subject to this subchapter, and that is consummated before September 30, 1995, a creditor or any assignee of a creditor shall have no

civil, administrative, or criminal liability under this subchapter for, and a consumer shall have no extended rescission rights under section 1635(f) of this title with respect to—

(1) the creditor's treatment, for disclosure purposes, of—

(A) taxes described in section 1605(d)(3) of this title;

(B) fees described in section 1605(e)(2) and (5) of this title;

(C) fees and amounts referred to in the 3rd sentence of section 1605(a) of this title; or

(D) borrower-paid mortgage broker fees referred to in section 1605(a)(6) of this title;

(2) the form of written notice used by the creditor to inform the obligor of the rights of the obligor under section 1635 of this title if the creditor provided the obligor with a properly dated form of written notice published and adopted by the Board or a comparable written notice, and otherwise complied with all the requirements of this section regarding notice; or

(3) any disclosure relating to the finance charge imposed with respect to the transaction if the amount or percentage actually disclosed—

(A) may be treated as accurate for purposes of this subchapter if the amount disclosed as the finance charge does not vary from the actual finance charge by more than $200;

(B) may, under section 1605(f)(2) of this title, be treated as accurate for purposes of section 1635 of this title; or

(C) is greater than the amount or percentage required to be disclosed under this subchapter.

(b) Exceptions

Subsection (a) of this section shall not apply to—

(1) any individual action or counterclaim brought under this subchapter which was filed before June 1, 1995;

(2) any class action brought under this subchapter for which a final order

certifying a class was entered before January 1, 1995;

(3) the named individual plaintiffs in any class action brought under this subchapter which was filed before June 1, 1995; or

(4) any consumer credit transaction with respect to which a timely notice of rescission was sent to the creditor before June 1, 1995.